Chapter XXIV.

ABATEMENT OF ELECTION CONTESTS.

734. The Tennessee election case of Kelly v. Harris in the Thirteenth Congress.

Although a contestant declined to prosecute further, the House declined to let the case abate and concluded the inquiry.

On May 31, 1813,[2] the Committee on Elections reported in the contested-election case, of Kelly *v.* Harris, from Tennessee, and the House, acting on the suggestion of the committee, gave the sitting Member three months in which to procure testimony.

On December 2, the contestant having declined to reappear to contest the case, the House determined not to abate the inquiry into the alleged illegality and recommitted the report of May 31, with such new evidence as might be offered, to the Committee of Elections.

On January 3, 1814, the committee made a report which, after quoting the constitution of Tennessee in respect to the qualifications of voters, decided that a certain vote had been given the petitioner in violation of this constitution, and therefore deducted the said vote. This, with the deduction of a vote given by a minor, led the committee to the conclusion that the sitting Member was entitled to his seat.

On March 10, 1814, the House concurred in this report.

735. The South Carolina election case of Mackey v. O'Connor in the Forty-seventh Congress.

The returned Member having died before the taking of testimony in a contest was completed, the House held that the contest did not therefore abate.

[1] By resignation of sitting Member. Section 805 of this volume. Contest not abated by death of contestant. Section 1019 of Volume II.

Contestant's acceptance of State office made incompatible by State constitution does not cause to abate. Section 1013 of Volume II.

Form of resolution permitting contestant to withdraw. Section 967 of Volume II.

[2] First session Thirteenth Congress, Contested Elections in Congress, from 1788 to 1834, p. 260.

A vacancy in a contested seat being filled by a special election, the House seated the new Member on his credentials, but held that his final right must depend on the issue of the contest.

On April 10, 1882,[1] Mr. Samuel H. Miller, of Pennsylvania, from the Committee on Elections, submitted the report of the majority of the committee in the South Carolina case of Mackey *v.* O'Connor.

The minority views, presented by Mr. Samuel W. Moulton, of Illinois, give the following statement of the preliminary facts:

In November, 1880, E. W. M. Mackey and M. P. O'Connor were opposing candidates for Congress in the Second Congressional district of South Carolina, and as the result of the election then held M. P. O'Connor was declared elected by the State board of canvassers, and received the usual certificate of such election, which was duly filed with the Clerk of the House of Representatives. Mr. Mackey contested the election of Mr. O'Connor in the usual form, and in the taking of testimony in such contest, by an agreement of which both parties availed themselves, all limitations as to time were expressly waived, so that the taking of the testimony was protracted over a much longer period than the term allowed by the statute, and before the taking of Mr. O'Connor's testimony was completed he died, on April 26, 1881.

The majority report says:

After the testimony in chief of Mr. Mackey, and that in reply of Mr. O'Connor had been taken, Mr. O'Connor died.

This slight difference between the two statements was noticed in the debate, but did not figure importantly.

The minority statement of fact goes on—

On May 23, 1881, the governor of South Carolina, in accordance with the provisions of the Constitution of the United States, issued his writ of election to fill the vacancy in the representation in Congress; and at the election held thereunder, on June 9, 1881, Samuel Dibble was elected, receiving his credentials June 22, 1881, and the same being filed with the Clerk of the House of Representatives on June 25, 1881.

Mr. Mackey, the contestant of the late Mr. O'Connor, did not serve any notice of contest of Mr. Dibble's election; but proceeded after the death of Mr. O'Connor, and before the election of Mr. Dibble, in taking testimony in the case of Mackey *v.* O'Connor; and the record as now filed and printed embraces testimony on both sides so taken after Mr. O'Connor's death and before Mr. Dibble's election.

On December 5, 1881, the House met, and Mr. Dibble, on the call of the roll, presented himself to be sworn. Objection was made by a Member of the House, who stated to the House the general circumstances of the case, and after calling the attention of the House to the fact that Mr. Mackey had served no notice of contest upon Mr. Dibble, offered the following resolution, viz:

"Resolved, That the certificate of election presented by the Hon. Samuel Dibble, together with the memorial and protest and all other papers and testimony taken in the case of the contest of E. W. M. Mackey *v.* M. P. O'Connor, now on file with the Clerk of this House, be, and the same are hereby, referred to the Committee on Elections, when appointed, with instructions to report at as early a day as practicable whether any vacancy as alleged in the certificate existed, and as to the prima facie right or the final right of said claimants to the seat as the committee shall deem proper; and neither claimant shall be sworn until the committee report."

Whereupon the House, after discussion, laid the resolution on the table; and also laid on the table a motion to reconsider its vote thereon.

Mr. Dibble then presented himself at the bar of the House, and was sworn, without further objection, and from that time until December 21, 1881, occupied his seat as a Member of the House without challenge or dispute.

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[1] First session Forty-seventh Congress, House Report, No. 989; 2 Ellsworth, p. 561.

Two preliminary questions, of so much importance as to obscure largely the merits of the election itself, arose in considering this case—

(1) The majority report so states the first question, relating to the validity of the contest itself—

At the commencement of the hearing, the sitting Member protested against the committee taking any action whatever upon the case, on the ground that the contest of Mackey *v.* O'Connor abated on the death of Mr. O'Connor, and that the House had no longer jurisdiction of that case. He contended that inasmuch as he was not a party to the pleadings or proofs, he should not be bound or affected by either; that the only way the title to his seat could be assailed was by commencing proceedings de novo and permitting him to defend Mr. O'Connor's claim.

In the opinion of the committee this position is utterly untenable. The contestant, Mr. Mackey, bases his claim upon the ground that he, and not Mr. O'Connor, received the greatest number of legal votes at the general election held November 2, 1880. To establish his claim, the provisions of the statute regulating the mode and manner of contesting an election were invoked and complied with. Notice of contest was duly served upon Mr. O'Connor, who, in turn, put in an answer thereto, and upon the issue thus made up a large mass of testimony, as heretofore stated, was taken.

The right of the contestant, as also of the people of that Congressional district, who, after all, are the real parties in interest, to have the facts of that election inquired into and adjudicated by the House, can not be changed by the fact of the death of the contestee. If the contestant really received at that election, as he claims, the largest number of legal votes, it is his right and the right of the people of that district that he be awarded the seat he was chosen to fill. The committee, however, are of opinion that Mr. Dibble, if elected to any position, was elected to fill the vacancy created by the death of Mr. O'Connor, and for his unexpired term.

This conclusion is emphasized by the significant language used in the proclamation of the governor ordering the special election by virtue of which Mr. Dibble claims the seat. It is as follows:

"STATE OF SOUTH CAROLINA, EXECUTIVE CHAMBER,

"*Columbia, S. C., May 23, 1881.*

"*To the commissioners of election and the managers of election for the counties of Charleston, Orangeburg, and Clarendon, composing the Second Congressional district of the State of South Carolina:*

"Whereas a vacancy in the representation of the said Second Congressional district in the House of Representatives of the United States of America has happened by the death of Michael P. O'Connor, who, at the general election held November 2, A. D. 1880, was chosen a Member of said House of Representatives for said Congressional district for the term of two years from March 4, A. D. 1881; and whereas the Constitution of the said United States in such cases requires the executive authority of the State to issue a writ of election to fill such vacancy:

"Now, therefore, you and each of you are hereby required to hold an election in accordance with the laws for holding general elections for a Member of the said House of Representatives for the said Congressional district, to serve for the remainder of the term for which the said Michael P. O'Connor was elected; the polls to be opened at the various places of election in the said counties on Thursday, the 9th day of June, A. D. 1881, by the various sets of managers for those places, respectively.

"Given under my hand and the seal of the State of South Carolina, this 23d day of May, in the year of our Lord one thousand eight hundred and eighty-one.

"JOHNSON HAGOOD, *Governor.*

"R. M. SIMS, *Secretary of State.*"

The right of Mr. Dibble to a seat in the House depends upon the title of Mr. O'Connor. By the very language of the proclamation he was a candidate "to serve for the remainder of the term for which the said Michael P. O'Connor was elected;" and if it appears from the proofs that Mr. O'Connor was not elected, then there was no vacancy created by his death, no remainder of a term to be filled, and Mr. Dibble could have no rights to be prejudiced by any pleadings or agreements made by Mr. O'Connor. In consenting to be a candidate to serve for the remainder of the term, for which Mr. O'Connor claimed to have been elected, Mr. Dibble rested his title to the seat in dispute upon the title of his predecessor, and he must be bound by the pleadings, proofs, and decree growing out legitimately of that contest. To insist that Mr. Mackey should abandon the testimony taken in the case prior to the death of Mr.

O'Connor—and all of it was taken prior thereto except the evidence of contestant in rebuttal, and which is not material so far as the true issue is concerned—and commence anew a contest with Mr. Dibble, involving the same specifications of contest, is, in the opinion of the committee, not only vain but in conflict with every principle of law and equity.

It was claimed by the counsel of Mr. Dibble in argument that if, after the testimony had been taken Mr. O'Connor had resigned, an election ordered by the governor to fill the assumed vacancy, and a successor elected, the contest between the original parties would abate as fully as if the contestee had died. These propositions must both stand or fall together. If such was the law, there would be nothing to prevent a contestee from abating a contest at any time at his own volition. If, after the testimony had been taken, the contestee should be forced to conclude that his case was hopeless, it would only be necessary for him to resign, have the governor order a new election, again be a candidate, with a hope that under circumstances more favorable to him and his party he might succeed. Assured that his former certificate was proven worthless he would have nothing to lose, and if successful in receiving a majority at the second election he would be enabled thereby, by his voluntary resignation, to escape the effect of the frauds perpetrated by him or his partisan supporters at the first election. It is only necessary to state the proposition to make manifest its fallacy.

The minority argued at length against the conclusion of the majority—

But, as we have already said, we think Mr. Dibble's rights are not to be affected in any way by this record in the case of Mackey *v.* O'Connor. We have already given an outline of the facts connected with Mr. Dibble's admission to his seat, and have quoted the words of the resolution referring the credentials of Dibble and the record of the case of Mackey *v.* O'Connor to the Committee on Elections, which was laid upon the table by the House, and have also shown that the House laid on the table the motion to reconsider the vote on that resolution.

Let us apply to these facts the principles of statute and parliamentary law which appear to us to be applicable thereto. And in this connection let us cite from our own recognized parliamentary compilation as to the effect of the motion to reconsider and lay on the table. Smith's Digest, page 292, concerning the motion "to lay on the table," contains this language:

"In the House of Representatives it is usually made for the purpose of giving a proposition or bill its 'death-blow;' and when it prevails, the measure is rarely ever taken up again during the session. If the motion to 'reconsider and lie' follow this motion, and be carried, it can only be taken from the table by the unanimous consent of the House."

And again (ibid., p. 293):

"If a motion to reconsider be laid on the table, the latter vote can not be reconsidered. (Journals, 3, 27, p. 334; 1, 33, p. 357.)"

Mr. Cushing, in his "Law and Practice of Legislative Assemblies," after showing the distinction between the English and American laws on the subject of legislative vacancies, proceeds as follows:

"If it [i. e., a vacancy] occurs before the sitting or in a recess, and the new election takes place without the previous authority of the assembly, the existence of a vacancy must be determined upon when the Member elected presents himself to take his seat."

In the history of vacancies in Congress, there is one case which in many respects resembles the present. In May, 1867, George D. Blakey and Elijah Hise were opposing candidates for Congress in the Third Congressional district of Kentucky, and four days after the election Mr. Hise died. Mr. Blakey appeared before the State canvassing board and claimed to have been elected. The board decided that Mr. Hise had been elected. Congress assembled thereafter on July 3, 1867; and on July 5, 1867, a memorial of Mr. Blakey was presented to the House, asking admission as a Member from the said Congressional district, and the memorial and accompanying papers were referred to the Committee on Elections, who were instructed by the House, July 11, 1867, in relation to taking evidence in regard to the same.

On July 20, 1867, Congress adjourned until November 21, 1867. During this interval, and while the Committee on Elections had under consideration the claim of Mr. Blakey to the seat, a special election was held in the Third Congressional district of Kentucky, under writs of election issued by the governor of Kentucky, to fill the vacancy occasioned by the death of Mr. Hise; and at such special election, held August 5, 1867, Mr. Golladay was elected, and on November 25, 1867, presented his credentials to the House.

An extended discussion followed. The distinguished chairman of the Committee on Elections, Mr. Dawes, after conceding the ordinary rule to be that charges touching "the legality of an election are matters which pertain to a contest in the ordinary way, and should not prevent a person holding the regular certificate from holding his seat," said:

"I do not see how it is possible to apply the rules laid down there to this case, without foreclosing Doctor Blakey from any further investigation of the question of a vacancy existing at that time." (Congressional Globe, 1, 40, p. 783.)

Other Members of the House took the position that Mr. Golladay should be seated prima facie, and that Mr. Blakey should be allowed to contest with him the right to his seat.

The House adopted the view of Mr. Dawes, and, instead of allowing Mr. Golladay to be sworn, referred his credentials to the Committee on Elections. Eight days afterwards Mr. Dawes presented the unanimous report of the Committee on Elections declaring that Mr. Golladay was entitled to the seat. (Congressional Globe, 2, 40, pp. 3, 56.) This report was adopted by the House, and necessarily recognized that the writs of election issued by the governor of Kentucky for the special election, were valid, even though the House had under consideration the question of the existence of a vacancy at the time. For had the writ of election of the governor of Kentucky been prematurely issued, the election would have been without legal sanction, and therefore invalid. And this decision of the House was not inadvertently rendered, for Mr. Blakey not only mentions in his memorial to the House that he had protested before the State authorities against the holding of the special election, but, in addition, reiterates it in his remarks before the House. But the House refused to recommit the report of the committee, ordered the previous question by a vote of 102 to 22, and adopted the recommendation of the committee without a division. (Congressional Globe, 2, 40, pp. 57, 61.)

Now, to recapitulate. What principles are involved in this decision? The main doctrine is, that the right and duty of the executive of a State to issue writs of election to fill vacancies in the House, derived from article 1, section 2, of the Constitution of the United States, in advance of any adjudication by Congress on the question of vacancy occasioned by death, is to be exercised in contested cases as well as in ordinary cases, thus applying to such cases the same principles so early settled in the cases of Edwards (Clark & Hall, 92), Hoge (Clark & Hall, 136), and Mercer (Clark & Hall, 44). And while as to the matter of practice in the case of Golladay there was a difference of opinion as to whether the credentials ought to be referred to the Committee on Elections, in order to determine finally as to the existence of a vacancy before seating Mr. Golladay, who held the certificate, or whether Mr. Golladay should be sworn and the right reserved to Mr. Blakey to contest his seat, there was no dissent from the proposition of Mr. Dawes, that if Mr. Golladay were sworn in without such reservation, Mr. Blakey would be foreclosed "from any further investigation of the question of a vacancy existing at that time."

Now, in the present case, not only was there no reservation of the right to contest Mr. Dibble's seat when he was sworn in, but the House, by a very decided vote, tabled a motion to refer the credentials of Mr. Dibble and the papers in Mackey *v.* O'Connor to the Committee on Elections, and tabled a motion to reconsider its vote thereon.

We do not mean to say, nor have we ever understood Mr. Dibble to contend, that it is beyond the power of the House to make inquiry into his right to his seat by such means at it may see fit to adopt in an investigation de novo. Such an investigation would give to the sitting Member the opportunity, which he has never enjoyed, of defending his seat by pleadings of his own and such proofs as he may be disposed to offer in his cause. It must be borne in mind that by the action of the House itself Mr. Dibble was placed in full possession and enjoyment of the office of Member, on December 5, 1881. This possession was clear from any qualification, reservation, or condition; it was as absolute as the possession of any Member on the floor. Can it be said a contest was pending in the case of Mackey *v.* O'Connor? The answer is that the House had decisively given "its deathblow" to the motion to make Mr. Dibble a party to that contest before he was sworn in.

It is premature to discuss and to pass judgment upon the effect of the election of November, 1880, upon the special election of June, 1881, because it is a mere speculative inquiry, until by some order of the House, which order has never yet been made, the sitting Member is placed in the position of a party to a contest, either under the statute or under a special order of the House adopted for the specific case.

If we look at the statute, we find the following language:

"SEC. 105. Whenever any person intends to contest an election of any Member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall

have been determined by the officers or board of canvassers authorized by law to determine the same, give notice, in writing, to the Member whose seat he designs to contest of his intention to contest the same, and in such notice shall specify particularly the grounds upon which he relies in the contest."

Section 106 provides for an answer by the Member thus served with notice. Section 107 provides for the taking of testimony, and incidentally, but without doubt, defines the term "Member" to mean "returned Member."

Now, there is nothing in the statute to limit its application to general in contradistinction to special elections. "To contest an election of any Member" is broad and comprehensive; and in this category Mr. Dibble, as a "returned Member," certainly may be embraced. Mr. Dibble was certainly elected at an election regularly held according to law. The cases of Hoge (Clark & Hall, 136), Edwards (Clark & Hall, 92), and Mercer (Clark & Hall, 44) and the case of Blakey *v.* Golladay settle that. The action of the House in seating Mr. Dibble recognizes the fact and puts it beyond dispute. It is unnecessary to cite authorities to show that questions concerning the legality of an election are proper matters of contest under the statute; they have been so treated in numerous cases.

And when we consider that Mr. O'Connor, the "returned Member" of the November election, had a right to a seat only so long as he lived, and had no inheritable or transmissible interest to be affected after his death, it is enough to state that a contest for his seat after his death is a contest for something that had ceased to exist. The only relation that could exist between himself and anyone that succeeded him was a relation of time, not a relation of privity. It can not be said that because Mr. O'Connor was elected for a term of two years he had a right in himself and his privies for two years, whether he lived or died. He only had a right for two years, provided he should live; the very fact of his death creating a vacancy shows that his right was absolutely gone at his death. And for anyone else to have or claim a right the original granting power—i.e., the people—had to be invoked, and they alone had the right to bestow the remainder of the term. In law the case of a suit against a life tenant is analogous. Can anyone claim that where one of two litigants of a close—the one in possession—dies, and another person enters into possession of the disputed territory under a fresh grant from the sovereign, the tenant thus entering can be ousted upon the proceedings had against his predecessor, such predecessor being neither his ancestor nor grantor, but simply a life tenant? And shall the right of a Member of this House to his seat, a right held to be a right of property, be decided on principles antagonistic to those which govern the decisions of other rights of property? We think not.

Recurring to the statute, we think it a reasonable construction of the same when we come to the conclusion that Mr. Dibble, as the returned Member of the House, was entitled to the notice required thereunder, in like manner as a Member elected and returned at a general election. One thing is certain that it was in the power of Mr. Mackey to serve such notice and to state as his grounds the same reasons he now advances for contesting the election of Mr. Dibble; and if the evidence taken in the previous contest of Mackey *v.* O'Connor were competent in the new case, he had the opportunity of submitting it on notice, as evidence in a contest against Mr. Dibble thus inaugurated, and we fail to find any statutory means by which Mr. Dibble, after his election, could, by any act of his, become a party to the case of Mackey *v.* O'Connor.

This being the case, and the House having seated Mr. Dibble, is there any precedent in law or in the decisions of this House in contested cases whereby the party in possession of his seat should go out to hunt an adversary? Is he to be the actor in any way? We fail to find any such precedent, and can only come to the conclusion that Mr. Mackey, having neglected to avail himself of the opportunity afforded him by the terms of the statute, whereby he could have inaugurated a contest in the usual form, in the first instance either willfully or mistakenly prevented Mr. Dibble from being a party to the issues he is now trying to force upon him.

Failing to find in the statute any mode whereby Mr. Dibble could be made a party to the case of Mackey *v.* O'Connor, and finding in it a mode whereby Mr. Mackey might have made the issues with Mr. Dibble on which he nows invokes the judgment of the House, but did not so take issue with Mr. Dibble, we can not come to the conclusion that the usual resolution of reference to the Committee on Elections of contested cases, adopted December 21, 1881, operated to revive the case of Mackey *v.* O'Connor, which had received "its deathblow" by the action of the House itself over two weeks previously to that time. Such resolution certainly did not make Mr. Dibble a party to the case of Mackey *v.* O'Connor, and we fail to find any action of the House which at any time had that effect. It therefore seems to us that if the case is within the statute, then Mr. Mackey has neglected to give the notice prescribed

by the statute to be given to the Member whose "election" is to be contested; and, on the other hand, if the case be outside of the statute, the House has never taken any order for proceedings in the matter against Mr. Dibble, the sitting Member, and without such order the committee are without jurisdiction to act concerning Mr. Dibble in the premises, having neither the statute nor any precedents of the House on which to support such claim for jurisdiction.

Under that provision of the Constitution which makes the House of Representatives the judge of the election, returns, and qualifications of its Members, the House may adjudicate the question of right to a seat in either of the four following cases: (1) In the case of a contest between a contestant and a returned Member of the House, instituted in accordance with the provisions of title 2, chapter 8, of the Revised Statutes; (2) in the case of a protest by an elector of the district concerned; (3) in the case of a protest by any other person, and (4) on the motion of a Member of the House. The proceeding in the first of these cases is, by the Revised Statutes, made a proceeding inter partea—a suit or action in which the contestant is plaintiff and the returned Representative defendant.

A case adjudicated by the House on the protest of an elector, or other person, or on the motion of a Representative, is not an action inter partes. It is a proceeding under the Constitution, and not under the statute.

The action inter partes provided for by the Revised Statutes abates on the death of either party. While the power of the House to adjudicate any question of title involved in that action survives, the action itself abates upon the death of either party thereto.

It follows that the contest of Mackey *v.* O'Connor abated on the death of Mr. O'Connor. That contest was an action inter partes. It was the technical action specially provided for in the Revised Statutes.

If the House shall hereafter adjudicate any of these questions, in a proceeding against Mr. Dibble, it will have the power, under the Constitution, to provide the rules for such adjudication.

When the House undertakes the adjudication of the right of a Member to his seat on the protest of an elector or other person, or on the motion of a Representative, it does not look to the statutes for its rules of procedure; it prescribes its own rules, in the exercise of its unquestionable constitutional power. If it finds any of the rules prescribed by law for technical contests available and useful in the case, it adopts them. Such rules then have force, not because found in the statutes, but because adopted by the House. But this constitutional power of the House to prescribe the rules for such adjudications is not an absolute or undefined power to be arbitrarily exercised by the House. Like every other constitutional power of the House it is to be exercised in subordination to those principles of justice which lie at the root of the Constitution and send their influences through all its provisions. For an adjudication made on the protest of an elector or other person, or on motion of a Representative, the House has no constitutional right to prescribe any rules which shall bind the sitting Member by pleadings or averments which he never made, by the testimony of witnesses whom he never had an opportunity to examine or cross-examine, by stipulations or admissions, or waivers which he never made, or by laches which he never incurred. The House has no right to make the title of a Representative to his seat subject to the acts or omissions, the diligence or laches, the wisdom or folly, of another man.

But if it were conceivable that the contest, which is by the Revised Statutes so clearly made a proceeding inter partes, could survive one of the parties, it would, nevertheless, be certain that when the House seated Mr. Dibble on his credentials that contest was dismissed and passed from the jurisdiction of the House. From the time when Mr. Dibble took his seat, in pursuance of the resolution of the House, it was his right to that seat which was to be assailed by any contestant, or claimant, or protestant. Since that time Mr. O'Connor's right has been a question for the adjudication of the House, not because it was once involved in the contest of Mackey *v.* O'Connor, but because it is now involved in the question of Mr. Dibble's right to the seat which he occupies. When the House admitted Mr. Dibble to the seat without condition or reservation, it invested him with the right which belongs to other sitting Members under the Constitution and the law to receive due notice of any proposed contest, to have the opportunity to answer, to examine his own witnesses, to cross-examine those of his opponents, and to be concluded by no acts, omissions, stipulations, laches, or waivers except his own.

It may, perhaps, be suggested that the contest of Mackey *v.* O'Connor was revived and referred to the committee by the resolution which was adopted December 22, 1881, in the following words:

"Resolved, That all of the testimony and all other papers relating to the rights of Members to hold seats on this floor in contested cases now on file with the Clerk of this House or in his possession, and all memorials, petitions, and other papers now in the possession of this House, or under its control,

relating to the same subject not otherwise referred, be, and the same hereby are, referred to the Committee on Elections, and ordered to be printed."

But the answer is obvious. The resolution did not refer to the committee papers which related to abated contests, but only those which related to pending contests. It did not revive dead suits. It only referred to the committee papers which related to existing suits. An order of reference places a paper before the committee for what it is worth. It imparts no new legal character or quality to the paper. It does not transform an answer in the case of Mackey *v.* O'Connor into an answer in the case of Mackey *v.* Dibble. It does not transform illegal evidence into legal evidence. It does not transform a witness for or against Mr. O'Connor into a witness for or against Mr. Dibble. It does not transform an admission, stipulation, or waiver by Mr. O'Connor into an admission, stipulation, or waiver by Mr. Dibble. It does not transform a dead suit, to which the papers relate, into a revived and pending action.

The first and only notice of contest of his seat ever served on the sitting Member, Mr. Dibble, by Mr. Mackey, was not served until January 4, 1882. Thereupon Mr. Dibble filed with the committee a protest against the committee's proceeding to consider and act upon the case of Mackey *v.* O'Connor, because it was evident from the notice served by Mr. Mackey that it was the intention of the contestant to assail his right to his seat by means of a case to which he was not a party. But a majority of the committee decided to proceed with the case, and overruled the protest of the sitting Member. For the reasons already set forth, we are of the opinion that the protest should have been sustained.

We can not concur in establishing as a precedent that a Member of this House, duly admitted to his seat, can be rightfully removed therefrom without any opportunity of defending his title thereto, either by pleading his defense, or by introducing evidence in his behalf. Nor can we subscribe to the opinion that the Committee on Elections, under its ordinary powers, can summon a Member of this House to defend a cause in which he is not the contestee, in which he is in no way named as a party, and in which the House has not only not required him to appeal, but has by its action declined to make him a party. If such a precedent is to be established, it will be giving to the Committee on Elections jurisdiction to act outside of the statute, and to inquire as to the seat of any Member on the floor at its discretion, and without the order of the House.

736. The case of Mackey v. O'Connor, continued.

Discussion as to informalities in the preparation of depositions in an election case.

The law governing the method of transmitting the testimony in an election case to the Clerk of the House was held to be directory merely.

Instance wherein ex parte affidavits were received as to a secondary question arising in an election case.

The House rejected a return of State election officers on the evidence of the returns of United States supervisors of elections.

(2) As to the validity of the testimony.

The testimony was taken by E. W. Hogarth, notary public and stenographer, and sitting Member produced before the committee an ex parte affidavit of Hogarth setting forth the following facts:

That he was employed by E. W. M. Mackey, esq., as stenographer and notary public in the contest between E. W. M. Mackey and M. P. O'Connor for a seat in the Forty-seventh Congress of the United States, and that deponent acted as stenographer, and sometimes notary public, in Orangeburg County on behalf of the Hon. M. P. O'Connor. That deponent took the testimony on the part of E. W. M. Mackey, esq., in the counties of Charleston, Orangeburg, and Clarendon, with the exception of one or two depositions. That all of the testimony so taken by deponent as stenographer was transcribed from his stenographic notes in deponent's own handwriting, and testimony taken on behalf of E. W. M. Mackey, esq., was turned over to him in deponent's own handwriting, and such taken on behalf of the Hon. M. P. O'Connor was turned over, in deponent's own handwriting, to Robert Chisolm, jr., esq. This ended his (deponent's) connection with said testimony, except that afterwards, at various times, he (deponent) signed certificates which were tendered to deponent by E. W. M. Mackey, esq., and

also jurats at the foot of depositions; these deponent signed without comparison with his said stenographic notes, taking it for granted that said testimony was the same as furnished by deponent to said E. W. M. Mackey, esq. That the said certificates were often presented to deponent for signature by said E. W. M. Mackey, esq., when deponent was otherwise employed, and that deponent did not have his stenographic notes at hand when he so certified said testimony.

That deponent also certified the testimony taken on behalf of Hon. M. P. O'Connor in instances where deponent acted as notary public.

That deponent did not forward any of said testimony to the Clerk of the House of Representatives, but turned same over to the respective parties named above, and deponent knows nothing of his personal knowledge concerning the forwarding of the same.

Sitting Member also produced the affidavit, also ex parte, of one C. Smith, who swore that he was employed by contestant to write out the testimony taken in his behalf, and that in writing it out made material changes, destroying the originals (i. e., the copy furnished by the stenographer, but not the stenographer's notes, which were retained by Hogarth).

Several other ex parte affidavits were produced by sitting Member tending to confirm this testimony as to the alteration of the affidavits.

It also appeared in the record of the case[1] that in a similar manner the testimony taken by Mr. O'Connor was delivered to the latter's son, who, assisted by Mr. Mackey, went over it to make corrections.

It also appeared that there had subsisted between the original parties to the contest an agreement, signed by Mr. Mackey and by the attorney of Mr. O'Connor, providing, among other things, that in all cases where "a deposition is not subscribed to by the party making the same the signature of such witness is hereby waived."[2]

The law of the United States in regard to the duties of the officer taking testimony in a contested election case provided:

Sec. 122. The officer shall cause the testimony of the witnesses, together with the questions proposed by the parties or their agents, to be reduced to writing in his presence and in the presence of the parties or their agents, if attending, and to be duly attested by the witnesses respectively.

Sec. 127. All officers taking testimony to be used in a contested election case, whether by deposition or otherwise, shall, when the taking of the same is completed, and without unnecessary delay, certify and carefully seal and immediately forward the same by mail addressed to the Clerk of the House of Representatives of the United States, Washington, D. C.

It appeared that the evidence was, moreover, transmitted to the House by express, and not by mail.[3]

The minority attacked the depositions and demanded their suppression on two grounds:

(*a*) Because the depositions were not reduced to writing in the presence of the notary.

Quoting the judiciary act of 1789—

And every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand into the court for which they are taken, or shall, together

[1] Record, Appendix, p. 359.

[2] See Record, p. 4372.

[3] Record, p. 4346.

with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any, given to the adverse party, be by him, the said magistrate, sealed up and directed to such court and remain under his seal until opened in court—

the minority contended that it was analogous to the law governing taking testimony in contested election cases, and that the decisions in relation to it sustained their contention. They quoted at length from Bell *v.* Morrison (1 Peters, 351), United States *v.* Smith (4 Day, 121), Edmonston *v.* Barrett (2 Cranch C. C., 228), and other decisions to show that a deposition was not admissible if it was not shown that it was reduced to writing in the presence of the magistrate. The minority conclude:

But it is argued that the original stenographic notes were written out in the presence of the notary public, and that this was a compliance with the statute. The authorities already cited are not consistent with this position. The object is the authentication of the testimony now on file with the Clerk of the House. And the agreement of the parties only extended to the substitution of the longhand transcript of the stenographic notes, and did not waive anything but the signatures of the witnesses thereto. The parties made no agreement that the depositions in longhand should be afterwards recopied by the contestant and his agents out of the presence of the notary, and that these papers should be forwarded, and the longhand depositions made by the notary should be destroyed. The part of the agreement bearing upon this matter is as follows:

"Fourth. That inasmuch as both parties intend to have the depositions of many of the witnesses taken in shorthand by a stenographer, which will render it impossible for such witnesses to subscribe to their depositions until the same shall be written out, which, in many instances, can not be done for some time after such depositions shall have been taken; and inasmuch as the signatures of the witnesses in such cases could only be procured by requiring a second attendance of such witnesses at considerable inconvenience and expense to all parties interested; therefore, in all cases where a deposition is not subscribed to by the party making the same the signature of such witness is hereby waived."

The contestant, Mr. Mackey, states that this rewriting of the depositions was done, not by agreement of the parties, but by agreement between the notary, Hogarth, and himself. But to our minds this conduct of a public officer was a violation of his plain duty under the statute, to retain the testimony in his own custody until forwarded, and this was aggravated, not excused, by collusion between the officer and one of the parties without the knowledge or consent of the other party.

We think, therefore, that the depositions substituted by the contestant and his agents for the originals written by Hogarth should be suppressed.

The majority, who denied, as a matter of fact, that the affidavits had been materially or harmfully altered, and who insisted that fourteen affidavits on which the decision of the case turned could not be impeached successfully, say:

It was further charged that the technical requirements of the statute in reference to taking testimony in contested elections had not been complied with, either in the transcribing of the depositions in their attestation or in the manner of their being forwarded to the Clerk of the House. To meet the first and really only serious charge the contestant filed the affidavits of 83 of the 94 witnesses examined by him, each of whom deposed that he had carefully read his deposition, as contained in the printed record, and that the same was in every particular the deposition made by him before the notary public, and that there had been no garbling or alteration in or addition thereto, and they each again made oath to the truth of the matters and things therein contained. The notary who, by agreement of Mr. Mackey and Mr. O'Connor, took the testimony stenographically, also made oath that in the limited time given him he had compared with his stenographic notes the depositions of 14 witnesses as printed in the record, and that the depositions as printed correspond in every particular with the original stenographic notes of such depositions.

The majority further say:

The affidavits submitted by the contestant in answer to Mr. Dibble's protest are uncontradicted by any affidavit filed by the latter, and they establish the fact that the testimony, as found in the printed

record, is in every particular the testimony actually given by the witnesses, and taken stenographically by the notary, and afterwards transcribed by his direction. It is not controverted that the evidence was, by the agreement of Mr. Mackey and Mr. O'Connor, taken stenographically by the notary. These stenographic notes are the original evidence of what the witnesses deposed. They were taken necessarily in the notary's presence, who was also the stenographer. They were really the depositions in the cause. By the stipulations it was agreed that these stenographic notes should be afterwards transcribed. The manner in which they were transcribed, and by whom transcribed, is a matter of no importance, providing they were transcribed correctly, since the notary public accepted the work as performed by the copyists, and certified to the same as being the depositions taken by him. The fact that the contestant assisted in making transcripts of this evidence does not detract from its correctness.

(b) The minority insisted that the evidence should have been transmitted to the House by the notary, and until so transmitted must remain in his custody.

The majority say:

The provisions of the statute in regard to the form and manner of taking and forwarding testimony in contested election cases are merely directory, and therefore the only question which the committee has deemed it necessary to consider upon this point has been whether the essential provisions of the law had been complied with; that is, had the testimony of the witnesses been correctly reported by the notary and stenographer, and had that testimony been forwarded to the House. If Mr. Dibble had shown by the proper evidence that the depositions before the committee were not the depositions of the witnesses (and he could have done this by the ex parte affidavit of the stenographer, if such was the case) he would have disclosed a matter fatal to their consideration.

This question as to the validity of the affidavits received the most attention during the debate, and was the point on which the minority apparently rested their defense with most confidence.

(3) As to the merits of the case.

The majority report says:

Under the election laws of South Carolina the governor of the State, prior to each general election, appoints for each county in the State three commissioners of elections. These commissioners of elections appoint for each poll in their respective counties three managers of elections. (Rev. Stat., Title II, chap. viii, sec. 2.) By the managers so appointed the election at each poll is conducted, and at its close the votes counted and a return thereof made to the commissioners of elections (15 Stat., 171), who, on the Tuesday next following the election, meet and organize as a board of county canvassers, and from the returns made to them by the managers they count or canvass the votes of the county and make such statements thereof to the State board of canvassers as the nature of the election requires, making for Representative in Congress "separate statements of the whole number of votes given in such county." (Rev. Stat., Title II, chap. viii, secs. 15–18.) From these statements of votes made by the county canvasser the board of State canvassers determine and certify the number of votes cast for the different candidates for the various offices voted for and declare what persons have been by the greatest number of votes duly elected to such offices. (Ibid., secs. 24–26.)

Acting upon the returns made by the county canvassers of Charleston, Orangeburg, and Clarendon, the counties composing the Second Congressional district of South Carolina, the State board of canvassers certified and declared that at the election held November 2, 1880, the vote cast for Representative in Congress from the said district was as follows (Rec., p. 11):

	M. P. O'Connor.	E. W. M. Mackey.
Charleston	11,429	8,112
Orangeburg	3,627	2,712
Clarendon	2,513	1,473
Total	17,569	12,297
	12,297	
Majority for O'Connor	5,272	

Although the vote certified by the State board of canvassers is a correct aggregate of the vote returned to it by the county boards of canvassers, it is not a true statement of the result of the election, because the returns made to the State board of canvassers by the county canvassers of Charleston and Orangeburg, upon which the State board acted, were not full and correct statements of the vote cast in those counties. Had the county canvassers in the three counties in the district counted the vote as returned to them by the managers of the election of the several precincts in the several counties, the result would have been a majority of 879 for Mr. Mackey. These managers in every instance and at every poll in the district were of the same political faith, and were the partisan supporters of Mr. O'Connor. The majority certified for Mr. O'Connor by the county board of canvassers, all of whom were Democrats, was obtained by entirely reversing the vote of one, Haut Gap, and leaving out in the final count seven precincts in Charleston County, to wit, Black Oak, Strawberry, Calamus Pond, Biggin Church, Brick Church, Ten Mile Hill, and Enterprise, and four in Orangeburg County, to wit, Fogles, Fort Motte, Lewisville, and Bookhardts.

The majority discuss the twelve precincts briefly and show that the actual vote cast at them is proven by the testimony of United States supervisors, sometimes corroborated by testimony of the State election officers.

The minority objected to the returns of the United States supervisors as evidence and discussed their status somewhat.

The minority did not concede that the majority for O'Connor was destroyed.

The majority, after arguing that there were great frauds in the district beyond what they had thought it necessary to show, recommended the following resolutions:

Resolved, That the Hon. Samuel Dibble is not entitled to hold the seat now occupied by him in this House as a Representative from the Second district of South Carolina in the Forty-seventh Congress.

Resolved, That the Hon. E. W. M. Mackey was duly elected as a Representative from the Second Congressional district of South Carolina in the Forty-seventh Congress, and is entitled to a seat in this House.

The report was debated at length from May 29 to May 31,[1] and on the latter day the resolutions of the majority were agreed to, yeas 150, nays 3, the minority refraining from voting.

Mr. Mackey then appeared and took the oath.

737. The Virginia election case of Walker v. Rhea, of Virginia, in the Fifty-seventh Congress.

The death of the contestant after the beginning of an election case did not prevent the continuation of the case to a decision.

A ballot complicated and unfair but not shown to be issued in pursuance of any conspiracy was not considered as a reason for discarding the return.

The fact that fewer votes were returned for contestant than for the head of his party ticket was held not to justify a conclusion of fraud.

On April 8, 1902,[2] Mr. Edgar Weeks, of Michigan, from the Committee on Elections No. 3, reported in the case of Walker *v.* Rhea, of Virginia. On the face of the returns the returned member received a majority of 1,751 votes. After the contest was begun the contestant died, but this did not prevent the further progress of the case.

[1] Record, pp. 4329, 4334, 4372–4398, Appendix, p. 357; Journal, pp. 1377–1380.

[2] First session Fifty-seventh Congress, House Report No. 1504.

The contest was based substantially on the following allegations and charges, viz:

First. That the official ballots printed and used in several of the counties were so complicated and unfair that it was very difficult, if not impossible, for voters to read, mark, and prepare them within the time of two and one-half minutes allowed by law for that purpose; that many of the electors who intended and tried to vote for contestant were disfranchised by reason of said unfair ballots, and that such ballots were so arranged and printed by the political friends of contestee with a fraudulent intent, and were calculated to deceive and mislead.

Second. That the returned member's majority over contestant of 1,751, while McKinley's majority over Bryan was 1,509 in the same district, is conclusive proof that the returns on their face were not an honest expression of the will of the voters at that election and that the contestant was defrauded and cheated.

Third. That the electoral boards and other election officers were guilty of fraud and dishonest practices in the interest of contestee, which accomplished contestant's apparent defeat.

Those charges and allegations were severally denied by the returned member and other pleas and explanations were interposed in his behalf.

The committee criticise the election laws of Virginia as conducive to fraud; but their conclusions as to the merits of contest were as follows:

> The Virginia election law provides that the official ballot shall be a white paper ticket containing the names of persons who have complied with the provisions of that act and the titles of the offices for which they are candidates, printed in plain roman type not smaller than that known as "pica." While the letter of the statute may have been complied with, several of the ballots, notably that in Scott County, if legal, were very unfair. On those ballots were the names of six candidates for President and Vice-President, the names of the electors for each, their residences, and the names of the contestant and contestee, with the titles of the offices for which they were candidates. No regard for order was observed in the form of the ballot or the arrangement of that matter, and the names of the Congressional candidates especially appear in unexpected and unlooked-for positions. They were necessarily very misleading and confusing.
>
> To say that the elector of ordinary intelligence and education would find it very difficult to examine, mark, and prepare that ballot in the two and one-half minutes allowed by law is a mild expression of a manifest truth. Under the law those official ballots, not only throughout the district, but throughout the whole State, could and should have been uniform and so arranged and printed as to assist rather than confuse. And if the object in preparing them were not to take unfair advantage, then the printers and members of the electoral boards who supervised the work were guilty of gross negligence or incompetency. However, your committee is not disposed to predicate its judgment on suspicion merely, or on facts or circumstances from which contrary inferences may be fairly drawn. It is not convinced that those unfair ballots were the result of a common purpose, or that they emanated from a common source, or that the contestee advised or approved of the use of such ballots, but, on the contrary, suggested that the ballots be made as plain as possible. Therefore this charge is dismissed.
>
> The fact that on the face of the returns contestee received 1,751 more votes than contestant and McKinley 1,509 more than Bryan is not, in the judgment of your committee, sufficient reason to justify the conclusion that such result was accomplished by fraud. After a careful examination of the record your committee does not find such affirmative and positive evidence of fraud or mistakes on the part of the election officers as will overcome contestee's certified majority or justify it in setting aside the election.

Therefore the committee reported that the contestant was not elected, and that the sitting Member was entitled to the seat.

On May 21 [1] the House, without division, concurred in the report of the committee.

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[1] Record. p. 5756.

738. The North Carolina election case of Moody v. Gudger in the Fifty-eighth Congress.

An election contest does not necessarily abate by reason of the death of contestant during the taking of testimony.

Hearsay evidence as to declarations of voter as to how he had voted or would vote was held incompetent.

Evidence as to the party affiliations of voters is inconclusive as proof of how they cast their ballots.

Hearsay evidence as to declarations of voters that they had been bribed is unsatisfactory and dangerous evidence.

On March 18, 1904,[1] Mr. H. O. Young, of Michigan, from the Committee on Elections No. 1, submitted the report of the committee in the North Carolina election case of Moody *v.* Gudger.

At the outset of this case the committee dispose of a preliminary question as follows:

After the pleadings had been completed and a part of the testimony had been taken the contestant, Maj. James M. Moody, died, and it is strongly urged by contestee that the proceedings were thereby abated. He says, however:

"The constitutional right of the House of Representatives to inquire into and pass upon the title of any Member to the seat occupied by him is not questioned. The Constitution, Article I, section 5, plainly makes the House the sole judge of the election returns and qualifications of its Members. Its jurisdiction and power under this section is sole and supreme. In such manner as it may deem advisable it may exercise this constitutional prerogative and no one may question its action, but the exercise of this power must originate with the House. By resolution or other original affirmative action it must declare its purpose to investigate and adjudge."

Your committee are of the opinion that when the House of Representatives referred this contest to your committee it took such affirmative action and clothed your committee with jurisdiction to hear and report upon the case. This doctrine is not without precedent. In the case of Mackey *v.* O'Connor, decided in the Forty-seventh Congress, an abstract of which appears upon page 387 of Rowell's Digest, the contestee died during the pendency of the proceedings. It was there contended by the attorney for Mr. Dibble, who had been elected to the vacancy caused by Mr. O'Connor's death, that the contest had abated and that it would be necessary for contestant to begin a new contest against the then sitting Member, but the majority of the committee thought otherwise. They said:

"The right of contestant, as also of the people of that Congressional district, who, after all, are the real parties in interest, to have the facts of that election inquired into and adjudicated by the House can not be changed by the fact of the death of the contestee."

The minority of the committee dissented, but the House agreed with the majority of the committee, and. being satisfied that upon the merits of the case contestant was duly elected, he was seated. The exercise of this power did not originate with the House, but with the contestant, and the House took no other affirmative action to declare its purpose to investigate and adjudge than the reference of the contest to the Committee on Elections.

In the later case of Dantzler *v.* Stokes, from South Carolina, in the Fifty-seventh Congress, Stokes having died, Mr. Lever, who had been elected to fill the vacancy thus caused, was permitted to defend the contest, and the case proceeded, though no final action was taken thereon by the House.

Contestee attempts to draw a distinction between the case of the death of contestant and that of contestee, but your committee is satisfied that such distinction is not well founded. The original jurisdiction of Congress is as perfect in one case as in the other. The people of the Congressional district, as was said in the case of Mackey *v.* O'Connor, "are the real parties in interest," and are as much concerned in not being misrepresented by a man they have defeated at the polls as they are in being represented by a man they have elected. If an election contest be regarded merely as a personal action it will abate by the death of either party. It is only because it is not merely a

[1] Second session Fifty-eighth Congress, House Report No. 1738; Record, p. 5430.

personal action but one in which the people of the Congressional district are interested, and because the House has a right of its own motion to investigate the election of its own Members, that the contest may proceed after the death of either party. Congress can not be ousted of its jurisdiction to turn from its doors an interloper by the fact that the person really elected has died.

As to the merits of the case, the committee found:

Upon the face of the returns contestee received 12,700 votes and contestant received 12,517 votes, giving contestee an apparent majority of 183 votes. Contestant in his notice of contest alleges that this apparent majority was obtained by bribery and fraud in South Waynesville precinct of Haywood County, and by misconduct of the registration and election boards in Tryon and Shields precincts of Polk County, where duly qualified electors were denied the right to vote, and large numbers of illegal votes were received in gross violation of law. He asks that the returns from these precincts be rejected. He also alleges similar frauds and misconduct in other precincts of said district, but he has offered no proof thereof, and your committee therefore disregards said allegations. He also alleges specifically that large numbers of illegal votes were cast, counted, and returned for contestee, naming the precincts in which they were thus cast and the number of said votes cast in each precinct. These aggregate nearly 900 votes. He also alleges in the same specific manner that about 60 legal votes were attempted to be cast for contestant and they were arbitrarily and illegally rejected by the registration and election boards.

Contestee in reply denies all the allegations of contestant above set forth, and further answering alleges in the same specific manner pursued by contestant that some 1,500 illegal votes were cast, counted, and returned for contestant.

It was conceded upon the argument by the attorneys for both parties that the individual votes cast, counted, and returned for contestant and those which were cast, counted, and returned for contestee that were proven to be illegal would substantially balance each other and would in no way affect the result. The committee, being satisfied that this is a fact, enters into no discussion of the nearly 2,400 separate and distinct issues raised by these individual cases and agrees with the attorneys in the case that the case must be determined by the final disposition to be made of the votes returned from the precincts of South Waynesville, Tryon, and Shields, and from the county of Buncombe. In these the vote was as follows:

	Gudger.	Moody.	Majority for Gudger.
Buncombe	3,029	2,690	339
Shields	150	60	90
Tryon	119	49	70
South Waynesville	266	147	119
Total	3,564	2,946	618

It will be readily seen that if the county of Buncombe be thrown out the result of the election would be changed; the same result would follow if the precinct of South Waynesville and either of the precincts of Tryon or Shields should be discarded; but the rejection of the two precincts of Tryon and Shields alone, or the rejection of South Waynesville, would still leave contestee a majority.

BUNCOMBE COUNTY.

The contestant in his notice of contest only asked for the rejection of certain votes in the county of Buncombe, but the attorney for contestant in his brief and in his oral argument before the committee demands the rejection of the entire vote of the county. Contestee objects that this contention is not open to contestant as it is not contained in his notice of contest. Your committee expresses no opinion upon this question, as their conclusion upon an examination of the facts renders a decision unnecessary.

The constitution of North Carolina provides that only legally registered voters shall be permitted to vote, and then follows this section:

"Every person presenting himself for registration shall be able to read and write any section of the constitution in the English language, and before he shall be entitled to vote he shall have paid, on

or before the 1st day of May in the year he proposes to vote, his poll tax for the previous year, as prescribed by article 5 of the constitution, section 1." (Constitution of North Carolina, art. 6, see. 4.)

The statute of North Carolina based upon this constitutional provision provides that—

"Every person liable for such poll tax shall, before being allowed to vote, exhibit to the registrar his poll-tax receipt for the previous year, issued under the hand of the sheriff or tax collector of the county or township where he then resided, and unless such poll-tax receipt shall bear date on or before the 1st day of May of the year in which he offers to vote such person shall not be allowed to vote: *Provided,* That in lieu of such poll-tax receipt it shall be competent for the registrar and judges of election to allow such person to vote upon his taking and subscribing to the following oath: 'I do solemnly swear (or affirm) that on or before the 1st day of May of this year I paid my poll tax for the previous year, as required by article 6, section 4, of the constitution of North Carolina.' " (Record, p. 5.)

It is made the duty of the sheriff to file a list of all persons who have paid their poll tax in time to qualify them as voters. Under the laws of North Carolina, however, all male persons over 50 years of age are exempt from the payment of the poll tax, and all male citizens who are under 21 years of age on June 1 of the year previous to that in which the election was held would owe no poll tax on the May I next preceding the election, and so could have no receipt and would not appear upon the sheriff's list of those who had paid their poll tax. No claim was made that any of these statutes or constitutional provisions are invalid. Contestant shows that some 500 men voted in Buncombe County whose names are not on the sheriff's list of those who had paid their poll tax in time to qualify them as voters. He claims that this was owing to a conspiracy to issue fraudulent tax receipts and exemptions after the time fixed by law for said purpose, and that said conspiracy was so largely carried out as to throw doubt and discredit on the entire vote of the county and render it impossible to determine how the honest vote of the county was cast.

Your committee finds the evidence of this conspiracy inconclusive. If it existed at all it was abortive of results, for the testimony clearly shows that the list of those who voted without being on the sheriff's list is largely made up of those who were too old or too young to be liable for the poll tax, and of those who were not conclusively shown to have been entitled to vote, at least as many were shown to have voted for contestant as for contestee. The committee desires to call attention to the incompetent and inconclusive character of much of the testimony as to how individuals voted. This consisted in a very large number of cases of the statement of some third party that the voter, who was not himself called as a witness, had said that he should vote or had voted for contestant or contestee, as the case might be. It is needless to say that this is hearsay.

Another class of testimony relied on was that certain voters were Republicans or Democrats, from which the inference was sought to be drawn that they had voted their party ticket for Member of Congress. That such testimony, if admissible at all, is inconclusive and of little weight will be conceded by every lawyer. But whether you allow to this testimony all the force that is sought to be given it by either of the parties or reject it altogether, the result is the same. In either case contestant has received at least as many illegal votes as contestee. Your committee therefore can not find any valid reason for rejecting the vote of Buncombe County.

SHIELDS PRECINCT, POLK COUNTY.

The contestant alleges that legal voters were denied registration in Shields precinct of Polk County, and that the ballot box was stuffed with illegal ballots. The evidence to sustain the latter charge is too puerile for consideration. There is no evidence tending to prove that more than one legal voter was denied registration, and there is other evidence just as credible tending to show that this one legal voter did not apply for registration at all, and so could not have been rejected. The vote of this precinct also, in the opinion of your committee, should be counted as cast and returned.

TRYON PRECINCT, POLK COUNTY.

The contestant claims that the votes of Tryon precinct, in Polk County, should be rejected because of the refusal of the registration officers to register a large number of qualified voters. Your committee can find no evidence tending to show that more than one legal voter was refused registration. A few illegal votes seem to have been cast, but this, in the opinion of your committee, was the result of accident rather than design, and the illegal votes are easily eliminated and do not affect the result. In the opinion of your committee the vote of this precinct should not be rejected.

This disposes of the case, as the precinct of South Waynesville, in Haywood County, even if rejected, would not alter the result, but as much stress has been laid upon this precinct in the argument of counsel your committee thinks best to report the facts relative to the election therein as it finds them.

SOUTH WAYNESVILLE PRECINCT, HAYWOOD COUNTY.

All the testimony tends to show that this precinct was normally Democratic from 200 to 250 majority. At the election in question it was carried by nearly all the Democratic candidates by majorities of over 200. It was the home, however, of contestant. He was popular there. Two years before he had carried the precinct by a majority of 26 against the Democratic candidate, Mr. Crawford. At that time there was disaffection in the Democratic ranks, and some of the most prominent Democratic workers were supporting contestant. These same men in 1902 were supporting contestee. The result of that election was a majority of 119 for contestee, who ran fully 100 behind the average of his ticket. Contestant claims that this result was brought about by wholesale bribery of voters by contestee, without which contestant would have carried the district by as large a majority as he had done two years previously.

It is evident, however, that the conditions had materially changed. In 1900 contestant was opposed by a divided Democratic party; in 1902 by a united Democratic party. There is considerable testimony to the effect that it was "common talk," "generally understood," "whispered about," and "a matter of common knowledge" that money was being used by the friends of both contestant and contestee for the purpose of influencing voters. There is also some testimony that a few men who had voted at the election told the witness that they had been offered money and in some cases that they had received money for their votes. Testimony of this kind is sometimes received in election cases from the difficulty of obtaining direct evidence of bribery, but at its best it is inconclusive, unsatisfactory, and dangerous. It is a most significant fact, however, that nearly all the active workers for both contestant and contestee were witnesses in the case, and each, while disclaiming any knowledge of the improper use of money by persons other than himself, when asked as to his own conduct, put himself upon his constitutional right and refused to answer questions which might criminate himself. The above is a fair statement of all the testimony tending to show the improper use of money by the supporters of the contestee.

There is no evidence to show that contestee used any money himself or was cognizant of the use of any money by his supporters in this precinct in his behalf, properly or improperly. On the contrary, there is strong direct testimony of the most positive nature, from those in a position to know, that he contributed no money whatever to be used in aid of his election in this precinct. No single voter is pointed out who was bribed to vote for contestee. For these reasons your committee think the vote of South Waynesville precinct should not be rejected.

It follows from these conclusions that in the opinion of your committee the contestant has not made out his case, and they therefore recommend the adoption of the following resolution:

"Resolved, That James M. Moody was not elected a Member of the Fifty-eighth Congress from the Tenth district of North Carolina.

"Resolved, That James M. Gudger, jr., was elected a Member of the Fifty-eighth Congress from the Tenth district of North Carolina, and is entitled to retain his seat therein."

The House agreed to the resolutions without debate or division.

739. The Maryland election case of Stewart v. Phelps in the Fortieth Congress.

Instance of the withdrawal of an election contest by letter from the contestant.

On July 5, 1867,[1] Mr. Charles E. Phelps, of Maryland, whose seat had been contested by Charles J. Stewart, presented a communication from Mr. Stewart, addressed to the House, in which he stated that he had proceeded to take testimony in support of the allegations in his notice of contest; but, finding the testimony insufficient to entitle him to the seat, he hereby withdrew his claim. This communication with accompanying papers was referred to the Committee on Elections.

[1] First session Fortieth Congress, Journal, p. 165; Globe, p. 500.

740. The Illinois election case of Durborow v. Lorimer, in the Fifty-eighth Congress.

Instance of abandonment of a contest by notification from contestant to the committee.

On April 20, 1904,[1] Mr. Marlin E. Olmsted, of Pennsylvania, from the Committee on Elections No. 2, presented the following report:

At the regular Congressional election in 1902 the returns showed William Lorimer, Republican, to have received 16,540 votes; Allan C. Durborow, Democrat, 15,555 votes; H. P. Kuesch, Socialist, 536, and Eugene W. Chapin, Prohibitionist, 667. Mr. Lorimer, having an apparent plurality of 985, received the usual certificate of election and is the present sitting Member from that district. Within the statutory period, however, Mr. Durborow served a notice of contest, claiming to have been rightfully elected to the said seat.

The contest seems to have been conducted mostly in the circuit court of Cook County, Ill., upon questions arising over the right to have the ballots produced and recounted. This privilege having been finally granted by the court and the ballots investigated and recounted, it developed that there had been cast for Mr. Lorimer 16,495 votes and for Mr. Durborow 15,501, the recount thus increasing Mr. Lorimer's plurality 9 votes.

From that point Mr. Durborow appears to have abandoned the contest. Neither printed record nor brief has been submitted to the committee, and the opportunity afforded for oral argument was not embraced. Mr. Durborow, however, has said to the chairman of the committee that, although he commenced the contest in good faith, he does not care to proceed with it further, and is willing that appropriate resolutions shall be adopted sustaining Mr. Lorimer's title to the seat. Your committee therefore recommends the adoption of the following resolutions:

"Resolved, That Allan C. Durborow was not elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress and is not entitled to a seat therein.

"Resolved, That William Lorimer was duly elected to membership in the House of Representatives of the United States in the Fifty-eighth Congress and is entitled to a seat therein."

The resolutions were agreed to without division.

741. The Kentucky election cases of Edwards v. Hunter and White v. Hunter, in the Fifty-eighth Congress.—On December 6, 1904,[2] the Speaker laid before the House the following communication; which was referred to the Committee on Elections No. 2:

CLERK'S OFFICE, HOUSE OF REPRESENTATIVES,

Washington, D. C., December 6, 1904.

Sir: I have the honor to lay before the House of Representatives the contested-election cases of Edwards *v.* Hunter and White *v.* Hunter, of the Eleventh Congressional district of Kentucky, notices of which have been filed with the Clerk of the House, and transmit herewith all original testimony, papers, and documents relating thereto.

On June 24, 1904, copies of the printed record were sent to the contestants, with notices to file brief of the facts and authorities relied on to establish their case. August 24, 1904, D. C. Edwards, one of the contestants, filed his brief, copies of which were sent to W. Godfrey Hunter, contestee, and to John D. White, contestant, with notice to file reply brief, but no reply brief has been received to date.

Very respectfully,

A. MCDOWELL,
Clerk House of Representatives.

Hon. JOSEPH G. CANNON,
Speaker House of Representatives.

This case was heard by the committee, but no report was made to the House, and Mr. Hunter retained the seat.

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[1] Second session Fifty-eighth Congress, House Report No. 2687; Record, p. 5186.

[2] Third session Fifty-eighth Congress, Record, p. 38.

742. The Colorado election case of Bonynge v. Shafroth in the Fifty-eighth Congress.

Instance wherein returned Member, while a contest was pending in committee, stated to the House that he was not elected.

Returned Member having acknowledged to the House, before the decision of the committee, that contestant was elected, the House preferred to adopt the usual resolutions before seating contestant.

Resolutions to seat a contestant are privileged, even though the case may still be pending in committee.

On February 15, 1904,[1] Mr. John F. Shafroth, claiming the floor for a question of privilege, said:

Mr. Speaker, in the contested election case of Robert W. Bonynge against John F. Shafroth it was stipulated and agreed by contestant and contestee that the ballots cast at that election in the twenty-nine contested precincts should be brought before the Committee on Elections of this House and opened for the first time in the presence of its Members. The ballots were those cast at the general election in 1902 for State officers and Representative in Congress. The object was that the original arrangement, form, and condition of the ballots should first be seen by the committee. The ballots were shipped to the Clerk of the House of Representatives at the joint expense of contestant and contestee.

At the first meeting of the committee for the hearing of this case the ballots were presented for inspection. A subcommittee was appointed to ascertain how many illegal ballots were contained therein. It was agreed that in order to facilitate their work their sessions should be secret. The subcommittee opened the ballots from three precincts, and finding that it took one week to examine them, asked the House for authority to employ an expert, which was granted. Since that time the expert has been examining the ballots, and on Thursday last made his report to the committee. The committee then ordered that each of the parties should have one week's time in which to examine the ballots, and if then either of us desired to send for the expert for the purpose of examining him that we should have that privilege. After that the case was to be set for argument before the committee.

On Thursday afternoon I commenced examining the ballots, and continued doing so during Thursday, Friday, and Saturday. I do not believe that 2,792 illegal votes were cast (that being my majority as returned), yet my examination disclosed the fact that the assurances which I had received as to the regularity of the votes in many of the precincts were not true, and that there were illegal votes therein which tainted the polls, and the polls so tainted gave me a greater plurality than my returned majority in the district.

The fact was a bitter disappointment to me, but nevertheless true.

The law is that when a poll is tainted by fraud and it is impossible to purge the poll of the fraudulent votes, the vote of the entire precinct, legal and illegal, must be thrown out.

The committee has given me every opportunity to ascertain the illegal vote so as to save the valid vote in those precincts. Until I saw the ballots last Thursday, I thought the illegal vote could be detected and separated from the legal vote, but I must confess that my inspection has convinced me that it is impossible to do so in this case.

The law being as I have stated and the number of precincts tainted containing majorities for me greater than my returned majority, I must say that if I were a judge upon the bench considering this case I would be compelled to find against myself, and as the vote in the contested precincts aggregates less than one-tenth of the vote in the Congressional district, I would be compelled to find that according to law Mr. Bonynge is entitled to the seat. [Applause.]

I did my best to have an honest election. My law partner, with my approval, organized a citizens' committee composed of both Republicans and Democrats who desired a fair election. The headquarters of that committee, as shown by the evidence in this case, were in the law offices of Rogers, Shafroth & Gregg, Denver, Colo.

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[1] Second session Fifty-eighth Congress, Record, pp. 1986, 1988.

I have always been in favor of pure politics, and when the test is applied to an election at which I was voted for as one of the candidates upon the ticket I should not shirk my duty or change my convictions concerning honest elections.

I therefore will say to the Committee on Elections No. 2 and to the Members of this House that they can seat Mr. Bonynge at their earliest convenience.

As this is the last time I will have the opportunity of addressing the House, I want to thank the Committee on Elections No. 2, and particularly the chairman, Mr. Olmsted, and the subcommittee, Mr. Miller, Mr. Currier, and Mr. Sullivan, for the fair and impartial manner in which they proceeded to investigate this case. Every suggestion which I made as to the investigation was readily concurred in.

I wish also to say that I appreciate the repeated declarations of Mr. Bonynge in the record that I was not a party to or in any manner connected with any of the frauds or irregularities charged. I also desire to thank the Members of this House for the uniform courtesy and evidences of respect which I have received during the eight years of my service in Congress. I have formed friendships here upon both sides of the Chamber which I shall cherish through life. I fully appreciate the high character of the men who compose this body, but it is only when I am about to leave that I fully realize the distinguished honor it is to serve as a Member in the greatest legislative body on the face of the globe. Wishing you all a happy and prosperous future, I will say good-bye. [Loud applause.]

Mr. Speaker, I will ask the chairman of the committee, if he is ready, to present the usual resolutions in a case of this kind.

Mr. Marlin E. Olmsted, of Pennsylvania, chairman of Elections Committee No. 2, asked unanimous consent that Mr. Bonynge, the contestant, be sworn in.

Mr. Sereno E. Payne, of New York, objected that this should not be done without a resolution from the committee. [The committee had not reported on the case.]

Later Mr. Olmsted asked unanimous consent for the consideration of the following resolutions:

Whereas John F. Shafroth, a Member of this House returned as elected from the first district of Colorado, and whose seat is contested by Robert W. Bonynge, has this day in a frank and honorable manner, very creditable to himself, informed the House that after a consideration and examination of the ballots he is convinced that Robert W. Bonynge is entitled to the seat: Therefore

Resolved, That John F. Shafroth was not duly elected and is not entitled to a seat in this House.

Resolved, That Robert W. Bonynge was duly elected and is entitled to a seat in this House.

The Speaker [1] said:

In the opinion of the Chair the resolution is privileged.

Thereupon the resolution was agreed to.

743. The New York election case of Chesebrough v. McClellan, from New York, in the Fifty-fourth Congress.

It being demonstrated to the Elections Committee that contestant had withdrawn, the House confirmed the title of sitting Member.

On January 15, 1896,[2] the Committee on Elections No. 2 reported in the case of Chesebrough *v.* McClellan, from New York. The contestant, in his notice of contest, had alleged as his grounds the casting of illegal votes at the election; and that during the political canvass preceding the election, the sitting Member had instigated the issue of a circular falsely charging him with opposing the passage of a State law for the benefit of cyclers; and that because of that circular many electors were

[1] Joseph G. Cannon, of Illinois, Speaker.

[2] First session Fifty-fourth Congress, House Report No. 48; Rowell's Digest, p. 513.

prejudiced to vote against contestant. The sitting Member replied to the notice of contestant, denying the casting and counting of illegal votes, denying that he had instigated the issuing or circulation of the circular, but alleging it to be a fact that the contestant had in fact signed his name to a petition in May, 1887, remonstrating against the legislation in question.

After serving the notice of contest the contestant had addressed to sitting Member a letter agreeing to withdraw from the contest if the sitting Member would exhibit to him the petition in question. The petition was duly exhibited; and later contestant notified sitting Member that he withdrew from the contest, and requested the return of the notice of contest.

Afterwards, in February, 1895, the notice of contest and answer were filed with the Clerk of the House, together with the affidavit of contestee that no evidence had been taken in the case. The committee examined these, as well as the letters of the contestant, found that no testimony had been taken in the case, and reported that the contestant had withdrawn from the contest.

Therefore they reported resolutions declaring the contestant not elected and the sitting Member entitled to his seat.

On January 15 [1] the House agreed to the resolutions without division.

744. The Illinois election case of Belknap v. McGann in the Fifty-fourth Congress.

Instance wherein the sitting Member appeared before the Elections Committee and orally conceded the election of contestant.

The sitting Member having announced that he conceded the election of contestant, the House passed the usual resolutions for seating the contestant.

On December 27, 1895,[2] the Committee on Elections No. 1 reported in the case of Belknap *v.* McGann, of Illinois, that the sitting Member had appeared before the committee and orally conceded the election of the contestant. The committee complimented the action of Mr. McGann, and the House agreed to the usual resolutions declaring Mr. McGann not elected and Mr. Belknap elected and entitled to the seat. Mr. Belknap was thereupon sworn in.

745. The Alabama election case of Comer v. Clayton in the Fifty-fifth Congress.

Instance wherein, during the taking of testimony, a contestant put in an attested notice of his withdrawal.

The contestant having withdrawn, the House passed a resolution confirming the title of sitting Member.

On January 19, 1898,[3] Mr. Romulus Z. Linney, of North Carolina, from the Committee on Elections No. 1, submitted a report in the case of Comer *v.* Clayton, from Alabama. The committee state that the contestant formerly withdrew after the taking of testimony had proceeded for some time, and consequently the testimony had not been printed or opened by the committee. As part of their report the committee present contestant's notice of withdrawal, which was duly attested.

[1] Journal, p. 117.

[2] First session Fifty-fourth Congress, House Report No. 5; Journal, pp. 79, 80.

[3] Second session Fifty-fifth Congress, House Report No. 195; Rowell's Digest, p. 554; Journal, p. 113.

The committee presented resolutions confirming the title of contestee to the seat, which were agreed to by the House without debate or division.

746. The Kentucky case of Hunter v. Rhea in the Fifty-fifth Congress.

A contestant having withdrawn his contest and accepted an office incompatible with membership, the House confirmed the title of sitting Member.

Instance wherein a contestant went before the Elections Committee and announced his withdrawal from the contest.

The Elections Committee asserted that it might proceed with an election case after the withdrawal of the contestant.

On May 17, 1898,[1] Mr. S. A. Davenport, of Pennsylvania, from the Committee on Elections No. 1, submitted a report in the case of Hunter *v.* Rhea, from Kentucky, as follows:

> By the official returns the contestee was given a majority of 337; the contestant claimed, on his theory of the case, to be elected by a majority of 468.
>
> The issues relate chiefly to questions involving the qualifications of certain voters, upon which differences of opinion naturally arise among honest judges of election and good lawyers.
>
> The testimony in the case was printed and briefs were filed with the committee. Before the case was set for hearing the contestant appeared before the committee and declared that he no longer desired to prosecute his contest; that since he began the same he had been appointed by the President minister of the United States to Guatemala. He has entered upon and is now discharging the duties of that office.
>
> Your committee is of opinion that it does not lose jurisdiction of the case by reason of this announced purpose of contestant to desist from the contest, but can proceed, if it so desires, to hear and report upon it as in other cases.
>
> But in the absence of any suggestion of collusion between the parties, in view of the character of the issues raised, and aided by the facts already recited, we do not deem it necessary to examine in detail the voluminous record in the case, and deem it our duty to confirm contestee's title to the seat he now holds.

In accordance with these conclusions the committee reported a resolution confirming the title of sitting Member to the seat, and the same was agreed to by the House without debate or division.

747. The Alabama election case of Clark v. Stallings in the Fifty-fifth Congress.

Instance wherein a contestant appeared before the Elections Committee and withdrew his case.

On January 18, 1898,[2] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the case of Clark *v.* Stallings, from Alabama, which was merely an announcement that the contestant took no steps after filing his notice of contest, and appeared before the committee on January 14, 1898, and stated that he had no desire to further press his contest. The committee therefore presented resolutions confirming the title of the sitting Member to his seat, and the House agreed to the same without debate or division.

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[1] Second session Fifty-fifth Congress, House Report No. 1356; Rowell's Digest, p. 557; Journal, p. 565.

[2] Second session Fifty-fifth Congress, House Report No. 188; Rowell's Digest, p. 554; Journal, p. 108.

748. The Delaware election case of Willis v. Handy in the Fifty-fifth Congress.

The contestant having announced to the committee his abandonment of the contest, the House confirmed the title of sitting Member.

On April 30, 1898,[1] Mr. R. W. Tayler, of Ohio, from the Committee on Elections No. 1, submitted a report in the Delaware case of Willis *v.* Handy, saying:

> The contestee, by the official returns, received 15,407 votes and the contestant 11,159. A notice of contest was served on the contestee, but the contestant took no further formal action. He appeared before your committee and declared his opinion that the contestee's seat could not be successfully attacked and that he had abandoned the contest.

Therefore the committee recommended resolutions confirming the sitting Member in his seat, which were agreed to by the House without debate or division.

749. The election case of Lyon v. Bates, from Arkansas Territory, in the Seventeenth Congress.

A contestant having procured no testimony in support of his petition, the Elections Committee recommended his withdrawal.

On December 19, 1821,[2] in the contested election case of Lyon *v.* Bates, from Arkansas Territory, the Committee on Elections recommended that the petitioner have leave to withdraw, since he had produced no testimony in support of his allegations that the returns on which the sitting Member obtained the seat were to a fatal extent improper and illegal.

750. The Louisiana election case of Smith v. Robertson in the Forty-seventh Congress.

A contestant having failed to prosecute his case according to law or to take testimony, the House dismissed the contest.

On March 4, 1882,[3] Mr. Samuel H. Miller, of Pennsylvania, from the Committee on Elections, presented this report:

> That after hearing argument, and after a full examination of the papers, it was unanimously agreed by the subcommittee having the case in charge that the contestant had not prosecuted his case according to law; that he failed to take evidence to substantiate his charges of contest; and therefore recommend that the contest be dismissed; which the full committee, upon due consideration, concluded to recommend. The committee therefore report the following:
>
> *Resolved,* That the contest of Alexander Smith *v.* E. W. Robertson, in Sixth Louisiana district, be dismissed without prejudice.

The House agreed to the resolution without debate or division.[4]

751. The Louisiana election case of Merchant and Herbert v. Acklen in the Forty-sixth Congress.

A contestant having failed to file the brief required by law, the Elections Committee notified him to appear and show cause why his case should not be dismissed.

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[1] Second session Fifty-fifth Congress, House Report No. 1239; Rowell's Digest, p. 557; Journal, p. 519.

[2] First session Seventeenth Congress, Contested Elections in Congress from 1789 to 1834, p. 372.

[3] First session Forty-seventh Congress, House Report No. 631; 2 Ellsworth, p. 284.

[4] Journal, p. 728; Record, p. 1610.

The contestant having failed to respond to a notice to appear, the House dismissed the case.

On March 7, 1881,[1] Mr. William M. Springer, of Illinois, from the Committee on Elections, submitted the report of the committee in the cases of Merchant and Herbert *v.* Acklen, from Louisiana. The report was as follows:

That the notices of contest and answers thereto were referred to the Committee on Elections and filed with the clerk of said committee on the 13th day of April, 1879. Evidence taken in the above cases was printed on the 15th day of January, 1880, and copies of the same were sent to the contestants, as required by the rules of the committee, by the clerk of said committee, with an official notice to prepare briefs within twenty days from the 25th day of January, 1880, to which no attention was given by said contestants.

On the 21st day of May, 1880, the clerk of the committee was directed by resolution to telegraph to Messrs. Merchant and Herbert to appear before the committee either in person or by attorney on the 29th day of May, 1880, and show cause why their cases should not be dismissed on account of the failure to file briefs as directed. No attention was given to these dispatches, and the parties neither appeared in person nor by attorneys, as notified. The said contestants were again notified by registered letters, on the 22d day of December, 1880, to appear before the Committee on Elections on the 11th day of January, 1881, and show cause why the cases should not be dismissed, and to this no reply was made.

We therefore respectfully recommend the adoption of the following resolution:

Resolved, That Joseph H. Acklen was duly elected and is entitled to a seat in this House as a Representative in the Forty-sixth Congress from the Third Congressional district of the State of Louisiana.

Resolved, That Robert O. Herbert and W. B. Merchant have leave to withdraw their papers of contest in this case.

The House agreed to the resolutions at once, without debate or division.[2]

752. The Indiana election case of McCabe v. Orth in the Forty-sixth Congress.

A contestant having failed, through a series of adverse incidents, to produce testimony, the House, on account of the lateness of the session, gave him leave to withdraw and confirmed the title of sitting Member.

A contestant having by affidavit given his reasons for asking further time to take testimony, the Elections Committee framed a resolution allowing the time.

On February 15, 1881,[3] Mr. William H. Calkins, of Indiana, from the Committee on Elections, submitted the report of the committee on the Indiana election case of McCabe *v.* Orth.

The sitting Member had been returned by an official majority of 98 votes.

The report states the preliminary facts:

On the 1st day of November, 1878, Mr. Orth received his certificate in due form from Hon. James D. Williams, then governor of Indiana. Within thirty days thereafter, and on the 12th day of November, 1878, Mr. McCabe served notice of contest upon Mr. Orth, specifying, as is alleged, the grounds of contest particularly, therein. This notice never came into the possession of your committee.

On the 5th day of December thereafter it is alleged that Mr. Orth fully answered each ground and specification of contest and served the same on that day on Mr. McCabe.

It is alleged by Mr. McCabe in a memorial presented to your committee, duly verified by him, that he did not take any testimony to support the several allegations in his notice of contest during the

[1] Third session Forty-sixth Congress, House Report No. 382; 1 Ellsworth, p. 345.

[2] Record, p. 2286.

[3] Third session Forty-sixth Congress, House Report No. 260: 1 Ellsworth, p. 320.

time allowed by law, for the reason, among others, that there was a contest pending between other contestants, which was in process of trial before the proper tribunal in the county of Montgomery, which would, and which did, develop substantially the evidence relied upon by him to overturn the declared result.

Contestant further urged illness in his family as a reason for not taking testimony within the time prescribed by law.

He further alleged that as early as February, 1879, he discovered evidence tending to support an allegation of bribery, which, if sustained, would destroy the official majority of sitting Member.

Of this memorial the report says:

This petition or memorial was presented to your committee on the 10th day of June, 1879. There were two other affidavits subsequently filed by Mr. McCabe, signed by Mr. Dobblebower and Mr. Paterson, in which affidavits each of the affiants testified that, on information and belief, facts tending to establish the bribery aforesaid might be elicited if time were given to take depositions.

In answer to this memorial supported by the affidavits of Mr. McCabe and the two witnesses aforesaid, Mr. Orth promptly filed his own affidavit with your committee, denying generally the specifications in Mr. McCabe's memorial and affidavit so far as it affected his right to a seat in Congress, and specifically denying any connection with or knowledge of the bribery alleged by Mr. McCabe. Numerous affidavits are also filed in support of Mr. Orth's claim.

An issue being thus made, your committee were called upon to decide whether under the circumstances additional time should be given the contestant to take testimony, and the contestee to rebut, when it was decided on the 23d day of March, 1880, to grant time, and the following resolution was adopted:

"*Resolved,* That James McCabe, contesting the right of the Hon. Godlove S. Orth to a seat in this House as a Representative from the Ninth Congressional district of the State of Indiana, be, and he is hereby, authorized to serve upon the said Orth within ten days after the passage of this resolution a particular statement of the grounds of said contest, and that the said Orth be, and he is hereby, required to serve upon the said McCabe his answer thereto in twenty days thereafter, and that both parties be authorized and required to proceed within ten days after the adjournment of this session of Congress to take evidence in the case, in the manner and subject to all provisions of law now in force applicable to the taking of evidence in contested election cases, the same as if the contestant had heretofore proceeded in time to take evidence in support of his claim to the seat."

By some inadvertence this resolution was never reported to the House, and the House consequently never acted upon it.

No testimony having been taken during the time allowed by law, and the resolution not having reached the House, whereby testimony might be taken under the order of the House, the case again came up at a meeting of the committee at this session of Congress, during last December. Your committee took the case up for consideration, and it being deemed unnecessary to report the aforesaid resolution to the House for action, because there did not remain sufficient time for the taking and certifying of testimony, or for the action of the committee of the House during the remaining time of this Congress, your committee reconsidered its former action, and on the 11th day of January, 1881, passed the following resolution:

"*Resolved,* That in view of the short time remaining before the adjournment, and the improbability of taking evidence under the statute, the resolution heretofore passed March 23, 1880, in reference to the contest in the case of McCabe *v.* Orth, be, and is hereby, rescinded, and the contest be, and is hereby, discontinued."

In view, therefore, of all the circumstances, your committee recommend the passage of the following resolution:

"*Resolved,* That the contestant, James McCabe, contesting the right of the Hon. Godlove S. Orth, from the Ninth Congressional district of Indiana, to a seat in the Forty-sixth Congress, have leave to withdraw his papers in said contest, and that the Hon. Godlove S. Orth's title to his seat in the said Congress be, and the same hereby is, confirmed."

On February 15, 1881,[1] the House agreed to the resolution without debate or division.

753. The Florida election case of Witherspoon v. Davidson in the Forty-seventh Congress.

A contestant having failed to make up his case legally, filed an affidavit explaining his failure and asked a special investigation by the House.

A contestant being apparently unable to perfect his case, the committee recommended that he have leave to withdraw his contest without prejudice.

On June 6, 1882,[2] Mr. A. A. Ranney, of Massachusetts, from the Committee on Elections, submitted the report of the committee in the Florida case of Witherspoon *v.* Davidson.

This was a case where no notice of contest, no answer, and no legally taken evidence came before the committee. Contestant appeared and produced an affidavit charging gross irregularities and frauds in the election, stating that he caused notice to be duly served of a contest, and further setting forth—

That he employed as his attorney T. W. Brevard, esq., and paid him $125 as a retaining fee to prosecute his case against his opponent, the said Davidson, and that the said Brevard utterly failed to do so, and betrayed him and sacrificed all his interests in the contest, and your deponent has reason to believe and does believe that the said Brevard entered into collusion with and conspired with Davidson for the purpose of defeating him, deponent, in his contest. He took from him, and declined and refused to return to your deponent, his notice of contest, the answer thereto, and other valuable papers and evidences essential to the successful prosecution of the case.

He further deposes and says that his witnesses were intimidated and prevented from appearing to testify in his behalf by threats of violence, and of being discharged from labor, and of being ejected from rented lands and houses, and by refusals of stock and implements to cultivate and gather their crops, and other threats of persecution and proscription if they should attempt to testify in behalf of your deponent.

In proof of these facts your deponent cites particularly a riot instigated in Madison County by the supporters and partisans of the Democratic party for the purpose of intimidating witnesses, at which riot one Patterson was killed, on account of which many arrests were made and the parties cast into jail, which had the effect of intimidating a large number of deponent's witnesses to an extent which made it impossible to induce them to testify in his behalf.

He further deposes and says that in some cases (that of Christie particularly), the officers of the law before whom appointments were made to take testimony, and where witnesses had been secured at great trouble and expense, the officer failed or refused to attend and hear testimony taken. By these and other methods only known to the lawless and mob-ridden communities of the South your deponent was defrauded out of his election and denied the right of exposing and proving the fraud, under the act of Congress made and provided in such cases. Therefore he prays that a committee be appointed with authority to proceed to Congressional district aforesaid and make a thorough investigation and report on the conduct and result of said election, with the view of ascertaining and determining who was lawfully elected as Representative in the Forty-seventh Congress of the United States from said first district of the State of Florida.

Sitting Member filed a counter affidavit denying the charges. The report says:

The committee caused a notice to be sent and delivered to the counsel named in contestant's affidavit, asking him to produce the papers in his hands, but he has omitted and declined to do so, he having taken no notice of the letter sent him, * * * save to acknowledge the receipt of same.

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[1] Record, p. 1604.

[2] First session Forty-seventh Congress, House Report No. 1278; 2 Ellsworth, p. 163.

Contestee exhibited to the committee the copies of the notice of contest served upon him and his answer thereto, together with a replication and amended notice, copies of which are annexed (Exhibits A, B, C), and moved to dismiss the proceedings. It was claimed and it appears that the notice of contest was insufficient and inadequate. It alleges certain frauds very generally, but does not set up or allege that contestant was elected. The replication enlarges the notice, however, and obviates some if not all of the objections.

The committee are of the opinion that contestant's failure to prosecute his contest arose from the causes which he sets forth in his affidavit. But they see no way of procuring the papers, or of investigating the case further, unless the House take the matter in hand and do it in their own way, either by sending a special committee to Florida to take the evidence or otherwise.

There is nothing which implicates contestee in any of the wrongful proceedings referred to.

The committee report the facts, and recommend that the contestant have leave to withdraw his contest without prejudice.

This report was submitted to the House on June 6.[1] It was stated that a member of the committee would file minority views, but this does not appear to have been done. Neither does it appear that the report was ever acted on by the House.

754. The Mississippi election cases of Newman v. Spencer, Ratcliff v. Williams, and Brown v. Allen, in the Fifty-fourth Congress.

Contestant not having filed any testimony, the House confirmed the title of sitting Member.

The Elections Committee declined to consider an a1legation that an election, otherwise unimpeached, was invalid because the constitution of the State was void.

On April 30, 1896,[2] Mr. Samuel W. McCall, of Massachusetts, from the Committee on Elections No. 3, submitted reports in the Mississippi cases of Newman *v.* Spencer, Ratcliff *v.* Williams, and Brown *v.* Allen. These cases involved a single question, and the reports are very nearly identical. The first report presents the whole of each case:

In this case no testimony has been presented to the committee. It is alleged that some was taken, but nothing has been filed with the Clerk of the House. The contestant, however, contends that section 241 of article 12 of the constitution of the State of Mississippi, adopted in 1892, is in contravention of the Constitution of the United States and of the act of Congress of February 23, 1870, entitled "An act to admit Mississippi to representation in the Congress of the United States," and has filed a brief in support of his contention. He claims that the above-named section of the State constitution is void, and that therefore no valid election was, or could be, held in the Seventh Congressional district of the State of Mississippi.

As the committee is of the opinion that a decision that the constitution of the State of Mississippi was invalid would not necessarily deprive the State of representation in Congress, it does not attempt to decide that question, and in absence of any testimony on behalf of the contestant it recommends the adoption of the following resolutions: [Here followed resolutions in the usual form.]

The resolutions, which confirmed the titles of the sitting Members to the seats, were agreed to by the House on the same day the reports were presented.

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[1] Journal, p. 1420; Record, p. 4577.

[2] First session Fifty-fourth Congress, House Reports Nos. 1536, 1537, and 1538; Rowell's Digest, p. 541; Journal, p. 440.

755. The Texas election case of Davis v. Culberson in the Fifty-fourth Congress.

A contestant having failed to produce testimony or respond to notification from the Elections Committee, the House confirmed the title of the returned Member.

On January 30, 1896,[1] Mr. Samuel W. McCall, of Massachusetts, from the Committee on Elections No. 3, submitted a report in the case of Davis *v.* Culberson, of Texas. The report says:

> The record in this case consists of the notice of contest, the answer, and an affidavit of David B. Culberson, all of which were filed by the contestee. Since the filing of the notice of contest the contestant appears to have done nothing in prosecuting his claim to the seat. He has not produced any testimony, and, although twice notified by letter, directed to his place of residence, he has not appeared before the committee.

In view of these facts, the committee did not believe the right of sitting Member to his seat should longer remain in question and so recommended resolutions confirming his title.

These resolutions were agreed to on the same day.

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[1] First session Fifty-fourth Congress, House Report No. 180; Journal, p. 163; Rowell's Digest, p. 529.